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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1971

No. 71-11

Supreme Court, U.S.

FILED

FEB 25 1972

ROBERT SEAYER, CLERK

JAMES R. JAMES, Judicial Administrator, and  
THE STATE OF KANSAS,  
Appellants,

vs.

DAVID E. STRANGE,  
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

**BRIEF OF APPELLEE**

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---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
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**BRIEF OF APPELLEE**

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**PRELIMINARY STATEMENT**

Appellee has examined the sections of Appellant's brief denominated *Opinion Below*, *Jurisdiction*, *Question Involved*, and *Statute Involved*. Appellee feels that the Appellant has accurately set out what is required under Rule 40 of the Supreme Court Rules. Appellee does, however, observe that the Appellant glossed over the District Court's findings in making the statement with respect to *Jurisdiction*. The District Court found, as a matter of fact, that K.S.A. 22-4513 unconstitutionally chills an indigent's exercise of his right to counsel guaranteed by the Sixth Amendment to the United States Constitution. (A. 15)

The State, in its Notice of Appeal, correctly says, in effect, that this finding of fact raises the question of law of whether the existence of state statutory procedures providing for the collection from an indigent defendant of monies expended by the State to furnish him counsel constitutes an *unlawful burden* upon an indigent defendant's Sixth Amendment right to the assistance of counsel.

### **ARGUMENT AND AUTHORITIES**

**I. The Challenged Portion of the Kansas Aid to Indigent Defendants Act, K.S.A. 22-4513, Is Not Constitutional in That It, in Fact, Burdens, Impedes, and Impinges upon the Indigent Accused's Exercise of a Basic Right—the Right to Have the Assistance of Counsel for His Defense. (Amendment VI, United States Constitution)**

In writing the Appellant's brief, it seems that the attorneys for the Appellant have taken a scattergun approach to their subject while avoiding the pertinent aspects of the case. In many respects, picking the points out of the Appellant's brief is much like picking buckshot out of the broad side of a barn. It is indeed difficult to identify and answer all of the points of argument embedded in the Appellant's brief. However, it is somewhat encouraging to the Appellee to note the lack of conviction in the tone and the lack of cohesion in the plan of the Appellant's brief. It may be supposed that recovering a mere \$17,000 over two years from the indigents (in most cases, as I know from my own experience, paid by relatives) would cause one to have a real lack of conviction. (See Appellant's brief, p. 10) The cost of the extra clerks necessary to handle the paperwork involved probably equalled the amount recovered.

Now, Circuit Judge Delmas C. Hill noted in his opinion (see Appendix to Jurisdictional Statement, p. A. 4):

"Plaintiff's most appealing contention is that enforcement of Section 22-4513 infringes upon his right to assistance of counsel because the statute has a chilling effect on the exercise of the right to counsel. Conversely, the question may be put whether the continued viability of the decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), requires the state to provide free court-appointed counsel to those accuseds who, like plaintiff, are financially unable to employ an attorney."

Of course, the accused, under this challenged statute, would not be limited to the problem of whether to accept court-appointed counsel. The accused's decision, under this Kansas statute, would have to include a consideration of whether to exercise other basic rights—the right to a jury trial (Article 3, Section 2, cl. 3, U. S. Constitution, and *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491), the right to confront and cross-examine the witnesses accusing him (*Pointer v. State of Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923), the right to subpoena witnesses on his own behalf (*Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019). The accused also would have to consider whether he wanted to subject himself to a judgment in and of itself: just how much should this judgment and the interest thereon be? Should the indigent accused's decision be based upon his needs? Or should the states be allowed to "chill" the indigent accused's exercise of basic rights in his hapless circumstances?

The State, in its brief, says at page 10:

"The sole issue presented is whether or not the State of Kansas may, if its legislature so decides, enact a statute providing a procedure for collection of expenses, including attorney's fees, from those persons determined to be indigent on whose behalf such funds were provided ..."

While claiming to be mindful of the nature of the right to counsel (Appellant's brief, page 13), the State finally outlines the problem from its point of view: that the indigent accused's financial situation should not create additional rights. The State says, in effect, that the non-indigent person has to determine just how much in the way of court procedure he wishes to avail himself of and that the indigent now has a carte blanche power which discriminates, not against the rich, but against some non-indigents.

This whole argument relates to a different standard than the one necessary for our constitutional scheme of government. As stated in *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has" (351 U.S. at 19). The standard must relate to the rich man. The plaintiff here was and is an indigent. He was an indigent at the time of his arrest; he was an indigent at the time he attempted to employ his own counsel; he was an indigent at the time counsel was appointed for him; and he remains an indigent today. As pointed out by Mr. Justice Douglas in *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963):

"There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual while the rich man has a meaningful appeal." (372 U.S. at 358)

Notwithstanding the State then says that the assumption by the District Court that the Kansas statute chills the indigent from the exercise of a basic right is speculation. (See Appellant's brief, p. 16) Yes, the basic complaint by the State is that some no-account, some poor, needy person, some indigent is going to get a better shake in the halls of justice than some average, tax-paying, indignant solid citizen.

By making such an argument, it seems to Appellee that the State is admitting that the reimbursement provisions do have a chilling effect on the free exercise of some basic rights—rights guaranteed constitutionally to all citizens of the United States. Does the mythical average, tax-paying indignant solid citizen wish to ignore the plain wording of the Sixth Amendment to the United States Constitution? Shouldn't this solid citizen feel more secure due to this effort to provide equal justice to the indigent? Should the state legislature be allowed to subvert, pervert and corrupt basic rights of the people? Should this Court endorse any state action which "chills" the exercise of basic rights?

The State, then, by arguing that the "poor" get "additional rights", admits the chilling effect of the reimbursement provisions of the challenged statute. However, the State attempts to divert our attention from the fundamental rights issue by asserting that the State was really only interested in "revenue"; thus, the provision for recovery of expenditures was included in the Indigent Defendants Act. (See Appellant's brief, p. 9) The State contends that this condition is all right because there are *many conditions* on the exercise of the right to counsel: (1) the indigent has to take the attorney who is appointed; (2) the indigent may be represented by an inexperienced attorney; and (3) the appointed attorney may not have the same supportive resources available as would the retained at-

torney. (See Appellant's brief, p. 17) This is egregious logic. The matters referred to as "conditions" by Appellant relate to who is appointed and to the quality of performance of counsel, not to the basic right to the assistance of counsel.

The State goes on to say in its brief at page 18 that the reimbursement provisions are "rationally related" to the problem of funding court-appointed counsel programs. Surely, the problem of funding will not be commingled with the exercise of a basic, fundamental right.

The State then says that it is the responsibility of the Kansas legislature to determine what is and what is not necessary with regard to public funds from the Kansas Treasury. (Appellant's brief, p. 18) But this responsibility to determine what is necessary with regard to public funds must be subordinated to a more primary responsibility: to insure each and every one of us basic rights. The primary responsibility of government is to organize its powers in such form as to provide safety and happiness, being ever mindful that its powers are derived from the consent of the governed.

Lastly, the State contends that the test of the validity of the legislative action is whether the condition *needlessly* burdens the exercise of a basic right. (Appellant's brief, p. 17) Surely the State did it for an "observable purpose"; a need for reimbursement. (Appellant's brief, p. 18)

Judge Hill, in writing for the District Court, did an outstanding job of discussing the issue with which the State is struggling: whether the chilling effect is unnecessary and, therefore, excessive. Judge Hill states:

"... And if the legislative objective is other than to deter the exercise of rights, the objective '(C)annot be pursued by means that needlessly chill the exer-

cise of basic constitutional rights. The question is not whether the chilling effect is "incidental" rather than "intentional"; the question is whether the effect is unnecessary and therefore excessive.'

"We must conclude that Section 22-4513 is unnecessary and therefore excessive. What can be more unnecessary than trying to recoup costs of counsel from an individual already adjudged to be an indigent and by definition unable to stand the very expense in question? In this light it is apparent that the statute needlessly encourages indigents to do without counsel and consequently infringes on the right to counsel as explicated in *Gideon v. Wainwright*, supra.

"Since we believe that the statute in its present form is a needless burden or condition on the exercise of a constitutional right, our attention now turns to whether the statute can be construed in any way to eliminate its chilling effect. In answer to this question, It appears that as long as the statute in any way requires the indigent to repay the state for legal services, the statute will remain as an unconstitutional burden to the exercise of constitutional rights, as those rights were laid out in *Gideon v. Wainwright*, supra.

"Unquestionably the guiding principle behind the *Gideon* decision was, 'The financial ability of the individual has no relationship to the scope of the (constitutional) rights (to counsel) involved here,' *Miranda v. Arizona*, 384 U.S. 436, 472 (1966).

"It is safe to say that the right to counsel is absolute and should not be fettered by the poverty of the accused because, as was indicated in *Miranda v. Arizona*, supra, the right to counsel does not mean that a defendant can consult a lawyer only if he has the funds to obtain one. To maintain unimpaired the con-

cept embodied in the *Gideon* decision, it appears necessary that the state pay for the indigent's legal counsel when the defendant cannot afford the cost. Anything less appears to be an impermissible impediment to the exercise of a constitutional right."

After examination of the State's brief, one can see that the effort here is an attempt to overturn, to limit, and to thwart the impact and viability of the decision of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 1461 (1963). Since that decision it has been clear that the State must furnish counsel, and it is equally clear that this is the responsibility (or burden) of the State, just as it is the responsibility (or burden) of the State to furnish an agency to enforce the law. Question: Who can say that a lawyer assigned to represent an accused is not also enforcing the law?

The language in *Gideon* drives home the point that lawyers in criminal courts are necessities, not luxuries. *Gideon* points out that, in our adversary system of criminal justice, any person haled into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. The Court also noted that, throughout the history of the United States, the laws, the constitutions of the various states and of the United States, have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. The Court further noted that this noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

There is no need to change, to overturn, to limit, or to undermine *Gideon*. (See Appellant's brief, p. 10) The Kansas statute in question here, and any of the other statutes which burden the exercise of a basic right, should be declared unconstitutional.

**II. The Need for the Unfettered Right to Counsel Is Paramount: The Decision Here Should Be Based on This Paramount Need and Not Confused with Niceties Involving the Equal Protection Clause or the Due Process Clause.**

An article entitled "Coming: The Right to Have Assistance of Counsel at All Appellate Stages," 52 ABAJ 135 (1966), discusses the relationship, if any, of the equal protection clause of the Fourteenth Amendment and the relationship of the due process clause, if any, with the unfettered right to counsel. The author, Mr. Jack G. Day, discusses them in a meaningful way as these two concepts relate to the matter before the Court in the instant case. At page 136 of the article, Mr. Day notes that:

"The Sixth Amendment makes no distinction between pretrial, trial, appeal, and post trial representation nor between capital and non capital or felony and misdemeanor cases. The breadth of the phrase 'the right . . . to have the Assistance of Counsel for his defense' in 'all criminal prosecutions' will lend itself an argument for the right to counsel at whatever stage and under whatever charge the accused finds himself threatened. However, the Supreme Court has indicated implicitly that counsel is required only at a 'critical stage'. *Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961). That an appeal falls within any reasonable interpretation of 'critical stage' is an obvious proposition. Moreover, the transcript cases' emphasis on equal protection forecasts more for the right to counsel at the appellate level than does the Sixth Amendment as encompassed by the due process clause of the Fourteenth.

"In *Douglas v. California*, no mention is made of the Sixth Amendment in the majority opinion. And, although it would be hard to prove from the mere ab-

sence of comment that no attention was paid to the Sixth Amendment in reaching the conclusions there, it is apparent from what is said that the main theoretical thrust in the case comes from the equal protection clause of the Fourteenth. This point acquired additional significance from the fact that *Gideon* was decided the same day as *Douglas*. And, having freshly read the due process clause in *Gideon* as requiring counsel *on the trial* of an indigent defendant, the majority of the Court chose to place its decision on the right to *appellate* counsel squarely on the equal protection clause, passing over (so it seems) the basis for its decision of that same day in *Gideon*.

"Mr. Justice Douglas, speaking for the majority, ignored the due process clause. Instead, he repeatedly repaired to the equal protection concept central to the transcript cases.

"Justice Black, in surprisingly conciliatory language in view of his firm position that the due process clause of the Fourteenth Amendment includes the specifics of the Bill of Rights, said: 'We accept *Betts v. Brady*'s assumption, based as it was on our prior cases that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory on the states by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights'. (372 U.S. at 342)

"Whether one adopts the 'fundamental and essential to a fair trial' argument (otherwise known as the 'implicit in the concept of ordered liberty' thesis) or thinks 'due process' is, among other things, shorthand for an application of the guarantees in the first eight amendments to the states, makes little difference once

the Court has found a particular right to be 'fundamental'. However, there is a great practical difference. So long as a right is not explicitly protected on one theory or the other but merely considered along with other facts in determining whether a 'fair trial' has been accorded, as was formerly the case with respect to the right to 'assistance of counsel', the 'right' has little security. For example, the 'fair trial' concept gave it an unusual plasticity to the right to counsel proposition. See *Betts v. Brady*, 316 U.S. 455 (1942), for a bizarre application of the pre-*Gideon* principle to deny counsel."

Mr. Day, on pages 136 and 137, further notes that:

"If one credits the emphasis of the opinion in *Douglas*, the right to counsel on appeal apparently does not depend on the *Gideon* rationale and therefore depends on neither the absorption of the Sixth Amendment into the Fourteenth Amendment's due process clause nor protection of the same right to appellate counsel as 'a fundamental principle of liberty and justice' implicit in due process. The denial of counsel to an indigent defendant is proscribed because it is an invidious discrimination contravening the equal protection clause of the Fourteenth Amendment. In effect, this may amount to the absorption of the Sixth Amendment's right to counsel into the equal protection clause, but if this is its theory the majority of the court does not say so. In any event, the implications of the 'equal justice for rich and poor' doctrine are far reaching."

This discussion is applicable to the matter at hand. After *Gideon* the State must grant an unfettered right to counsel: that right is not dependent upon the due process clause nor is it dependent upon the equal protection clause of the Fourteenth Amendment.

Mr. Lee Silverstein, in his article, "The Continuing Impact of *Gideon v. Wainwright* on The States", 51 ABAJ 1023, points out many of the questions raised by *Gideon* (and other) decisions. (See page 1026) He mentions the problem of reimbursement but *does not analyze it constitutionally*. He notes, particularly, as does the State herein, that the Criminal Justice Act of 1964 infers that there may be reimbursement. 18 U.S.C.A. 3006A (f).

Later Mr. Dallin H. Oaks, in his article, "Improving The Criminal Justice Act", 55 ABAJ 217 (1969), details in more depth the aspect of reimbursement as it relates to the issue of appointment of counsel for indigent defendants. At page 219 of his article, Mr. Oaks points out that a handful of jurisdictions require a convicted C.J.A. defendant to reimburse the treasury as a condition of probation. Then he notes that this requirement is probably unconstitutional under *Rinaldi v. Yeager*, 384 U.S. 305 (1966). Of course the Supreme Court of the State of California in *In re. Allen*, 1969, 78 Cal.Rptr. 207, 455 P.2d 143, on the basis of the chilling effect that reimbursement has on the exercise of the basic fundamental right, did, in fact, declare this procedure unconstitutional.

The case before the Court is an example of the reluctance on the part of some to provide an unfettered right to counsel for the indigent. Stated in other words, there is a feeling that some of the indigents should have to pay back to the state what the state has paid to the indigent's appointed counsel. *The problem is figuring out how to do it constitutionally*. (Opinion of the Justices, N.H., 1969, 256 A.2d 500)

In *Allen*, supra, as in this case, the accused was not forewarned of the possibility of indebtedness to the county (or state) for the cost of counsel. Justice Burke pointed out at p. 144:

"... The government is without constitutional authority to impose a predetermined condition on the exercise of a constitutional right or penalize in some manner its use. (See *Gardner v. Broderick*, (1968) 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (police officer would be discharged unless he waived immunity from prosecution); *Uniformed Sanitation Men Ass'n v. Commissioner*, (1968) 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (garbage men would be discharged unless they testified at a hearing investigating their activities); *Griffin v. California*, (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (adverse comment unless defendant testified); *United States v. Jackson*, (1968) 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (federal statute provided that if defendant waived a jury the death penalty could not be imposed).)"

The statement of the right to assistance of counsel is clear: the fact that the Kansas statute, K.S.A. 22-4513, penalizes the exercise of this basic right is obvious. Again, the need for the unfettered right to counsel is paramount; the decision here should be based on this paramount need and not confused with niceties involving the equal protection clause or the due process clause.

### CONCLUSION

The Kansas statute attacked herein does, in fact, have a chilling effect precisely when the indigent needs to avail himself of a fundamental right. The Kansas statute needlessly burdens the exercise of a basic right. The State shouldn't be allowed to pervert our precious constitutional guarantees nor frustrate our basic constitutional framework of government by a provision of law which would cause the poor to be relegated as a class to a position where they wouldn't have hope, wouldn't have faith in our participating democracy.

History advises that governments and laws tend to militate against those who are least able to defend themselves. The rights of the poor in our society have, for lack of adequate equal counsel, too often been unprotected. Injustices that could have been prevented, had they been brought before the bar, have often continued unabated.

When I undertook the court appointment to do my best for David E. Strange, I most certainly did not contemplate that I would become so involved that I would take his case to a Three-Judge Federal District Court. Nonetheless, I failed to tell David Strange that I wasn't "free" court-appointed counsel. Thus, I have felt morally obligated to bring this case to those who can prevent an injustice to this poor boy, and to others in similar circumstances. This case, to use the State's logic, has created something of a burden on me. However, I am proud to be an American and to aid and assist the unfortunate. Hopefully, I can help in some small way to reinforce my belief that our democracy will work. I know that my position and my belief as to David Strange's case are right. I have confidence that the Supreme Court of the United States will agree with me and will uphold the decision and judgment of the Three-Judge District Court declaring the Kansas statute, K.S.A. 22-4513, to be unconstitutional.

The Court must continue fearlessly: it must not allow the various state legislatures or the Congress to forget what makes this country great. Free legal counsel for the indigent accused must be recognized and reiterated as a fundamental right of a free society.

Respectfully submitted,

JOHN E. WILKINSON,  
Attorney for the Appellee,  
David E. Strange

JAMES, JUDICIAL ADMINISTRATOR, ET AL.  
v. STRANGE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF KANSAS

No. 71-11. Argued March 22, 1972—Decided June 12, 1972

Kansas recoupment statute enabling State to recover in subsequent civil proceedings legal defense fees for indigent defendants, invalidated by District Court as an infringement on the right to counsel, held to violate the Equal Protection Clause in that, by virtue of the statute, indigent defendants are deprived of the array of protective exemptions Kansas has erected for other civil judgment debtors. Pp. 129-142.

323 F. Supp. 1230, affirmed.

POWELL, J., delivered the opinion for a unanimous Court.

Edward G. Collister, Jr., Assistant Attorney General of Kansas, argued the cause for appellants. With him on the brief were Vern Miller, Attorney General, and Matthew J. Dowd, Assistant Attorney General.

John E. Wilkinson argued the cause and filed a brief for appellee.

Marshall J. Hartman filed a brief for the National Legal Aid and Defender Association as *amicus curiae*.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents a constitutional challenge to a Kansas recoupment statute, whereby the State may recover in subsequent civil proceedings counsel and other legal defense fees expended for the benefit of indigent defendants. The three-judge court below held the statute unconstitutional, finding it to be an impermissible burden upon the right to counsel established in *Gideon*

v. *Wainwright*, 372 U. S. 335 (1963).<sup>1</sup> The State appealed and we noted jurisdiction, 404 U. S. 982.

The relevant facts are not disputed. Appellee Strange was arrested and charged with first-degree robbery under Kansas law. He appeared before a magistrate, professed indigency, and accepted appointed counsel under the Kansas Aid to Indigent Defendants Act.<sup>2</sup> Appellee was then tried in the Shawnee County District Court on the reduced charge of pocket picking. He pleaded guilty and received a suspended sentence and three years' probation.

Thereafter, appellee's counsel applied to the State for payment for his services and received \$500 from the Aid to Indigent Defendants Fund. Pursuant to Kansas' recoupment statute, the Kansas Judicial Administrator requested appellee to reimburse the State within 60 days or a judgment for the \$500 would be docketed against him. Appellee contends this procedure violates his constitutional rights.

## I

It is necessary at the outset to explain the terms and operation of the challenged statute.<sup>3</sup> When the State

<sup>1</sup> The opinion of the three-judge court is reported in 323 F. Supp. 1230 (Kan. 1971).

<sup>2</sup> Kan. Stat. Ann. §§ 22-4501 to 22-4515 (Supp. 1971).

<sup>3</sup> Kan. Stat. Ann. § 22-4513 (Supp. 1971). The statute reads as follows:

"(a) Whenever any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense services to any defendant, as authorized by section 10, . . . such defendant shall be liable to the state of Kansas for a sum equal to such expenditure, and such sum may be recovered from the defendant by the state of Kansas for the benefit of the fund to aid indigent defendants. Within thirty (30) days after such expenditure, the judicial administrator shall send a notice by certified mail to the person on whose behalf such expenditure was made, which

provides an indigent defendant with counsel or other legal services, the defendant becomes obligated to the State for the amount expended in his behalf. Within 30 days

notice shall state the amount of the expenditure and shall demand that the defendant pay said sum to the state of Kansas for the benefit of the fund to aid indigent defendants within sixty (60) days after receipt of such notice. The notice shall state that such sum became due on the date of the expenditure and that the sum demanded will bear interest at six percent (6%) per annum from the due date until paid. Failure to receive any such notice shall not relieve the person to whom it is addressed from the payment of the sum claimed and any interest due thereon.

"Should the sum demanded remain unpaid at the expiration of sixty (60) days after mailing the notice, the judicial administrator shall certify an abstract of the total amount of the unpaid demand and interest thereon to the clerk of the district court of the county in which counsel was appointed or the expenditure authorized by the court, and such clerk shall enter the total amount thereof on his judgment docket and said total amount, together with the interest thereon at the rate of six percent (6%) per annum, from the date of the expenditure thereof until paid, shall become a judgment in the same manner and to the same extent as any other judgment under the code of civil procedure and shall become a lien on real estate from and after the time of filing thereof. A transcript of said judgment may be filed in another county and become a lien upon real estate, located in such county, in the same manner as is provided in case of other judgments. Execution, garnishment, or other proceedings in aid of execution may issue within the county, or to any other county, on said judgment in like manner as on judgments under the code of civil procedure. None of the exemptions provided for in the code of civil procedure shall apply to any such judgment, but no such judgment shall be levied against a homestead. If execution shall not be sued out within five (5) years from the date of the entry of any such judgment, or if five (5) years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant and shall cease to operate as a lien on real estate of the judgment debtor. Such dormant judgment may be revived in like manner as dormant judgments under the code of civil procedure.

"(b) Whenever any expenditure has been made from the aid to indigent defendants' fund to provide counsel and other defense

of the expenditure, the defendant is notified of his debt and given 60 days to repay it.<sup>4</sup> If the sum remains unpaid after the 60-day period, a judgment is docketed against defendant for the unpaid amount. Six percent annual interest runs on the debt from the date the expenditure was made. The debt becomes a lien on the real estate of defendant and may be executed by garnishment or in any other manner provided by the Kansas Code of Civil Procedure. The indigent defendant is not, however, accorded any of the exemptions provided by that code for other judgment debtors except the homestead exemption. If the judgment is not executed within five years, it becomes dormant and ceases to operate as a lien on the debtor's real estate, but may be revived in the same manner as other dormant judgments under the code of civil procedure.<sup>5</sup>

services to any defendant, as authorized by section 10, . . . a sum equal to such expenditure may be recovered by the state of Kansas for the benefit of the aid to indigent defendants fund from any persons to whom the indigent defendant shall have transferred any of his property without adequate monetary consideration after the commission of the alleged crime, to the extent of the value of such transfer, and such persons are hereby made liable to reimburse the state of Kansas for such expenditures with interest at six percent (6%) per annum. Any action to recover judgment for such expenditures shall be prosecuted by the attorney general, who may require the assistance of the county attorney of the county in which the action is to be filed, and such action shall be governed by the provisions of the code of civil procedure relating to actions for the recovery of money. No action shall be brought against any person under the provisions of this section to recover for sums expended on behalf of an indigent defendant, unless such action shall have been filed within two (2) years after the date of the expenditure from the fund to aid indigent defendants."

<sup>4</sup> Failure to receive notice, however, does not relieve the person to whom it is addressed of the obligation.

<sup>5</sup> A dormant judgment may be revived within two years of the date on which the judgment became dormant. Kan. Stat. Ann. § 60-2404 (1964).

Several features of this procedure merit mention. The entire program is administered by the judicial administrator, a public official, but appointed counsel are private practitioners. The statute apparently leaves to administrative discretion whether, and under what circumstances, enforcement of the judgment will be sought. Recovered sums do, however, revert to the Aid to Indigent Defendants Fund.

The Kansas statute is but one of many state recoupment laws applicable to counsel fees and expenditures paid for indigent defendants.<sup>6</sup> The statutes vary widely in their terms. Under some statutes, the indigent's liability is to the county in which he is tried; in others to the State. Alabama and Indiana make assessment and recovery of an indigent's counsel fees discretionary with the court. Florida's recoupment law has no statute of limitations and the State is deemed to have a perpetual lien against the defendant's real and personal property and estate.<sup>7</sup> Idaho, on the other hand, has a five-year statute of limitations on the re-

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<sup>6</sup> There is also a federal reimbursement provision, 18 U. S. C. § 3006A (f):

"Receipt of other payments.—Whenever the United States magistrate or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant."

<sup>7</sup> The board of county commissioners has discretion to compromise or release the lien, however. Fla. Stat. Ann. § 27.56 (Supp. 1972-1973).

covery of an "indigent's" concealed assets at the time of trial and a three-year statute for the recovery of later acquired ones. In Virginia and West Virginia, the amount paid to court-appointed counsel is assessed only against convicted defendants as a part of costs, although the majority of state recoupment laws apply whether or not the defendant prevails. It is thus apparent that state recoupment laws and procedures differ significantly in their particulars.<sup>8</sup> Given the wide differences in the features of these statutes, any broadside pronouncement on their general validity would be inappropriate.

We turn therefore to the Kansas statute, aware that our reviewing function is a limited one. We do not inquire whether this statute is wise or desirable, or "whether it is based on assumptions scientifically substantiated." *Roth v. United States*, 354 U. S. 476, 501 (1957) (separate opinion of Harlan, J.). Misguided laws may nonetheless be constitutional. It has been noted both in the briefs and at argument that only \$17,000 has been recovered under the statute in its almost two years of operation, and that this amount is negligible compared to the total expended.<sup>9</sup> Our task, however, is not to weigh this statute's effectiveness but its constitutionality.

<sup>8</sup> State recoupment statutes, including those quoted above, are as follows:

Ala. Code, Tit. 15, § 318 (12) (Supp. 1969); Alaska Stat. § 12.55.020 (1962); Fla. Stat. Ann. § 27.56 (Supp. 1972-1973); Idaho Code § 19-858 (Supp. 1971); Ind. Ann. Stat. § 9-3501 (Supp. 1970); Iowa Code Ann. § 775.5 (Supp. 1972); Md. Ann. Code, Art. 26, § 12C (Supp. 1971); N. M. Stat. Ann. § 41-22-7 (Supp. 1971); N. D. Cent. Code § 29-07-01.1 (Supp. 1971); Ohio Rev. Code Ann. § 2941.51 (Supp. 1971); S. C. Code Ann. § 17-283 (Supp. 1971); Tex. Code Crim. Proc., Art. 1018 (1966); Va. Code Ann. § 14.1-184 (Supp. 1971); W. Va. Code Ann. § 62-3-1 (Supp. 1971); Wis. Stat. Ann. § 256.66 (1971).

<sup>9</sup> For fiscal 1971 \$400,000 was appropriated to fund the program.

Whether the returns under the statute justify the expense, time, and efforts of state officials is for the ongoing supervision of the legislative branch.

The court below invalidated this statute on the grounds that it "needlessly encourages indigents to do without counsel and consequently infringes on the right to counsel as explicated in *Gideon v. Wainwright*, *supra*." 323 F. Supp. 1230, 1233. In *Gideon*, counsel had been denied an indigent defendant charged with a felony because his was not a capital case. This Court often has voided state statutes and practices which denied to accused indigents the means to present effective defenses in courts of law. *Douglas v. California*, 372 U. S. 353 (1963); *Draper v. Washington*, 372 U. S. 487 (1963); *Lane v. Brown*, 372 U. S. 477 (1963); *Griffin v. Illinois*, 351 U. S. 12 (1956). Here, however, Kansas has enacted laws both to provide and compensate from public funds counsel for the indigent.<sup>10</sup> There is certainly no denial of the right to counsel in the strictest sense. Whether the statutory obligations for repayment impermissibly deter the exercise of this right is a question we need not reach, for we find the statute before us constitutionally infirm on other grounds.

## II

Appellants have asserted in argument before this Court that the statute "has attempted to treat them [indigent defendants] the same as would any civil judgment debtor be treated in the State courts . . . ." <sup>11</sup> Again, in their brief appellants assert that "[f]or all practical purposes the methods available for enforcement of the judgment are the same as those provided by the Code of Civil

<sup>10</sup> See n. 2, *supra*.

<sup>11</sup> Tr. of Oral Arg. 9. The State concedes that exemptions for other civil judgment debtors are broader than for indigent defendants, *id.*, at 10, a matter we will address forthwith.

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Procedures or any other civil judgment.”<sup>12</sup> The challenged portion of the statute thrice alludes to means of debt recovery prescribed by the Kansas Code of Civil Procedure.<sup>13</sup>

Yet the ostensibly equal treatment of indigent defendants with other civil judgment debtors recedes sharply as one examines the statute more closely. The statute stipulates that save for the homestead, “[n]one of the exemptions provided for in the code of civil procedure shall apply to any such judgment . . . .”<sup>14</sup> This provision strips from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors, including restrictions on the amount of disposable earnings subject to garnishment, protection of the debtor from wage garnishment at times of severe personal or family sickness, and exemption from attachment and execution on a debtor’s personal clothing, books, and tools of trade. For the head of a family, the exemptions afforded other judgment debtors become more extensive, and cover furnishings, food, fuel, clothing, means of transportation, pension funds, and even a family burial plot or crypt.<sup>15</sup>

Of the above exemptions, none is more important to a debtor than the exemption of his wages from unrestricted garnishment. The debtor’s wages are his sustenance, with which he supports himself and his family. The average low income wage earner spends nearly nine-tenths of those wages for items of immediate consumption.<sup>16</sup> This Court has recognized the potential of

<sup>12</sup> Brief of Appellant 7.

<sup>13</sup> See Kan. Stat. Ann. §§ 60-701 to 60-724, 60-2401 to 60-2419 (1964 and Supp. 1971).

<sup>14</sup> The exemptions in the civil code are set forth in Kan. Stat. Ann. §§ 60-2301 to 60-2311 (1964 and Supp. 1971).

<sup>15</sup> Kan. Stat. Ann. §§ 60-2304 and 60-2308 (1964 and Supp. 1971).

<sup>16</sup> Bureau of Labor Statistics, Handbook of Labor Statistics 281 (1968). Low-wage earners are defined as families with after-tax income of less than \$5,000.